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**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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Application of Herbert Braker and Lost Lake  
Preservation Association, Inc., for a Permit to  
Place an Aerator on the Bed of Lost Lake, Town of  
Calamus, Dodge County, Wisconsin

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Case No.: 3-SC-99-2040

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT**

Herbert R. Braker, N700 N. Lost Lake Road, Randolph, WI 53956, and Lost Lake Preservation Association, Inc., W11316 Schultz Drive, Beaver Dam, WI 53916, completed filing an application with the Department of Natural Resources for a permit to place an aerator on the bed of Lost Lake in the SE ¼ of the SW ¼ of Section 5, Township 11 North, Range 13 East, Town of Calamus, Dodge County, Wisconsin.

The Department of Natural Resources received a Letter of Objection to the permit application from several riparian landowners.

Pursuant to due notice hearing was held on February 2, 2000, at Beaver Dam, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Attorney Michael Cain  
P. O. Box 7921  
Madison, WI 53707-7921

Lost Lake Preservation Association, Inc., by

Attorney Bruce W. Elbert  
Elbert & Pfitzinger, Ltd.  
P. O. Box 203  
Juneau, WI 53039-0203

Don Westphal, President  
W10200 CTH DE  
Beaver Dam, WI 53916

Susan Tamminga  
W11342 Schultz Drive  
Beaver Dam, WI 53916

#### FINDINGS OF FACT

1. Lost Lake Preservation Association, Inc. (LLPA) and Herbert Braker (Braker), 700 North Lost Lake Road, Randolph, Wisconsin, 53956, completed filing an application with the Department of Natural Resources (the Department) for a permit under sec. 30.12, Stats., to place a floating aerator anchored on the bed of Lost Lake, Town of Calamus, Dodge County. The Department and the applicants have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. Mr. Braker, the co-applicant, owns real property located in the SE  $\frac{1}{4}$  of the SW  $\frac{1}{4}$  in Section 5, Township 11 North, Range 13 East, Dodge County. The above-described property abuts Lost Lake which is navigable in fact at the project site.

3. The applicants propose to install a horizontal floating aspirator aerator anchored to the bed of Lost Lake by means of attached cement pails. Because it is so anchored, the aerator is a "structure" within the meaning of sec. 30.12(2), Stats., and requires a permit from the Department.

4. The purpose of placement of the aerator is to improve the fishery and avoid the winter kill of fish by drawing oxygen from the air that is absorbed by the lake water. The aerator would be deployed only when dissolved oxygen (DO) levels in the lake threaten fish populations.

5. Lost Lake consists of approximately 250 surface acres. It is relatively shallow, no more than eight feet deep, and is ringed by wetland fringes on its southwest and northeast ends. There is a public boat launch approximately 400 feet north of the proposed project site. Placement of the aerator will not impede snowmobilers gaining access to the lake from the boat launch.

6. The aerator would create open water in the otherwise frozen lake in winter. It is expected that the open water area would be approximately 100 feet by 200 feet. The applicants demonstrated a familiarity with the operation of the aerator system and with methods of protecting winter lake users from the open water.

7. The proposed structures will not materially obstruct existing navigation on Lost Lake and will not be detrimental to the public interest upon compliance with the conditions of this permit.

8. The applicants are financially capable of constructing, maintaining, monitoring or removing the structures if it should be found in the public interest to do so.

9. The proposed structures will not reduce the effective flood flow capacity of Lost Lake.

10. The proposed structures will not adversely affect water quality nor will it increase water pollution in Lost Lake. The structure will not cause environmental pollution as defined in sec. 281.01(10), Stats., if the structure is built and maintained in accordance with this permit.

11. The Department has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Adm. Code, regarding assessment of environmental impact.

### DISCUSSION

The objectors expressed reasonable concerns about the safety of the open water area and the related issue of liability. The Association demonstrated that it was prepared to deploy and maintain the aerator in a responsible manner consistent with its obligations under sec. 167.26, Stats. This statute exempts persons who properly mark and barricade ice holes from liability for damages relating to injuries suffered by persons entering the open water area. (167.26(3), Stats.) The Association should note that this same statute imposed criminal penalties for failure to mark and/or barricade the open water area.

There are no known environmental risks from placement of the aerator, which should instead aid in the maintenance of a good fishery over the winter months. Given the costs of operation, it is extremely unlikely that the aerator will be used more than the minimum necessary to maintain dissolved oxygen levels.

### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structure subject to the conditions specified.

2. The co-applicant, Mr. Braker, is a riparian owner within the meaning of sec. 30.12, Stats.

3. The proposed anchored aerator described in the Findings of Fact constitute a structure within the meaning of sec. 30.12, Stats.

4. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Adm. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicants, a permit under sec. 30.12, Stats., for the placement and maintenance of a structure as described in the foregoing Findings of Fact, subject, however, to the conditions that:

1. The authority herein granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest.
2. The permittees shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the Department for the purpose of investigating the construction, operation and maintenance of the project.
3. The permit granted herein shall expire three years from the date of this decision, if the structure is not completed before then.
4. The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Corps of Engineers.
5. The aerator shall be placed on the water only as needed to maintain an acceptable level of dissolved oxygen (DO) in Lost Lake.
6. The permittees shall regularly monitor DO levels to ensure that condition 5 above is followed.
7. The aerator shall be roped-off, marked and maintained as required by sec. 167.26, Stats.
8. The permittees shall make every effort to educate the public, provide signage and otherwise inform the public in general and likely Lost Lake users in particular that the aerator is in operation. The permittees shall inform local snowmobile clubs of the existence of the aerator on an annual basis.

Dated at Madison, Wisconsin on February 16, 2000.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By:



JEFFREY D. BOLDT  
ADMINISTRATIVE LAW JUDGE

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.